

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

CONSUMERS UNION OF UNITED	)	
STATES, Inc.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:10cv268
	)	
consumerreport.com, <u>et al.</u>	)	
	)	
Defendants.	)	
	)	

REPORT AND RECOMMENDATION

This matter came before the Court on plaintiff's Motion for Sanctions in the Nature of Default Judgment and Award Attorneys' Fees and Costs (Dkt. 32). After defendant Registrant failed to file an opposition, the Court took plaintiff's motion under advisement to issue this Report and Recommendation.

BACKGROUND

On March 18, 2010 plaintiff Consumers Union of United States, Inc. filed this *in rem* action against five defendant domain names alleging cyberpiracy in violation of Section 43(d) of the Lanham Act of 1946; 15 U.S.C. § 1125(d). On May 4, 2010 the registrant of the domain names, Netex Galaxy, Ltd. ("Registrant") undertook to defend its claim to the names, and filed a Motion for Extension of Time to Answer the Complaint, which the Court granted. (Dkt. 6,7).

On September 27, 2010, plaintiff brought a motion to compel discovery. (Dkt. 22). Registrant failed to file an opposition. Nevertheless, Counsel for Registrant appeared at the hearing on

plaintiff's motion and represented that discovery was forthcoming. On October 8, this Court granted plaintiff's motion to compel, ordering Registrant to comply with discovery request by October 21 and to pay the attorneys' fees associated with bringing the motion. At the hearing and in the order, the Court warned Registrant of the possibility of Rule 37 dismissal for failure to comply. (Dkt. 25).

By October 27, Registrant had not yet produced any discovery, prompting Plaintiff to file its Motion for Sanctions. (Dkt. 32). Plaintiff seeks a default judgment, attorneys' fees and costs against the Registrant pursuant to Federal Rule of Civil Procedure 37. Registrant failed to file an opposition to the motion, and the Court notified the parties it would resolve this matter on the pleadings.

#### APPLICABLE LAW

Under Rule 37(b) of the Federal Rules of Civil Procedure, a district court has wide discretion to impose a sanction against a party for failure to comply with a discovery order, including dismissal of the action or proceeding in whole or in part. Fed. R. Civ. Pro. 37(b)(2)(A)(v); *Anderson v. Foundation for Advancement, Education and Employment of American Indians*, 115 F.3d 500 (4<sup>th</sup> Cir. 1998)(upholding grant of default judgment under Rule 37 for failure to comply with a discovery order). Entry of default is warranted where the court has made clear the threat of Rule 37 dismissal. *Id.* at 503-04; *Mutual Federal Savings & Loan Assoc. v. Richards & Assoc., Inc.*, 872 F.2d 88, 92 (4<sup>th</sup> Cir. 1989)(Rule 37 dismissal appropriate where the court warned defendant of possible default sanction).

RECOMMENDATION

The undersigned Magistrate Judge recommends that default judgment be entered pursuant to Rule 37 for violation of this Court's October 8<sup>th</sup> order.

On October 8<sup>th</sup>, the Court ordered Registrant to furnish discovery within eleven (11) days of the order, and including the following warning: "Netex Galaxy is warned that if it fails to comply with discovery it shall be subject to sanctions pursuant to Federal Rule of Civil Procedure 37, including dismissal of its claim to the domain names." (Dkt. 25). To date, Registrant has not provided any responses to plaintiff's discovery requests. Accordingly, Registrant is in violation of this Court's order. Moreover, Registrant has failed to provide the Court with a reason why sanctions should not be imposed in this case. The parties have informed the Court that the subject domain names have already been transferred to the plaintiff by Registrant. Therefore, the Court recommends that default judgment be entered against Registrant.

NOTICE

The parties are advised that exceptions to this Report and Recommendation pursuant to 28 U.S.C. § 636 and Rule 72(b) of the Federal Rules of Civil Procedure must be filed 14 days after service. A failure to object waives appellate review of a judgment based on this Report and Recommendation.

The Clerk is directed to send a copy of this Report and  
Recommendation to all counsel of record.

\_\_\_\_\_/s/\_\_\_\_\_  
THERESA CARROLL BUCHANAN  
UNITED STATES MAGISTRATE JUDGE

November \_\_15\_\_ , 2010  
Alexandria, Virginia